

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT CHRISTOFANO and)	
EVA CHRISTOFANO,)	
)	
Plaintiffs,)	
)	
v.)	Civ. No. 03-1090-SLR
)	
ATLANTIC VIEW MOTEL,)	
)	
Defendants.)	

MEMORANDUM ORDER

At Wilmington, this 27th day of February, 2004, upon review of defendant's motion to dismiss for lack of subject-matter jurisdiction (D.I. 5), and plaintiff's response thereto;

IT IS ORDERED that defendant's motion (D.I. 5) is **denied without prejudice** for the reasons that follow:

1. Plaintiffs filed the present complaint on December 2, 2003 alleging violations under the American With Disabilities Act of 1990, 42 U.S.C. § 1201 ("ADA"), and related Delaware state law claims. Defendant filed the present motion to dismiss for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), on December 18, 2003. (D.I. 5)

2. Defendant contends that it is not a covered employer within the meaning of the ADA as it does not employ at least fifteen employees in each of twenty or more calendar weeks during the current or preceding year. (D.I. 5, ¶ 2)

3. Not only may the lack of subject matter jurisdiction be raised at any time, it cannot be waived and the court is obliged to address the issue on its own motion. See Moodie v. Fed. Reserve Bank of NY, 58 F.3d 879, 882 (2d Cir. 1995). Once jurisdiction is challenged, the party asserting subject matter jurisdiction has the burden of proving its existence. See Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62, 69 (3d Cir. 2000). Under Rule 12(b)(1), the court's jurisdiction may be challenged either facially (based on the legal sufficiency of the claim) or factually (based on the sufficiency of jurisdictional fact). See 2 James W. Moore, Moore's Federal Practice § 12.30[4] (3d ed. 1997).

4. Under a facial challenge to jurisdiction, the court must accept as true the allegations contained in the complaint. See id. Dismissal for a facial challenge to jurisdiction is "proper only when the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-1409 (3d Cir. 1991) (quoting Bell v. Hood, 327 U.S. 678, 682 (1946)).

5. Under a factual attack, however, the court is not "confine[d] to allegations in the . . . complaint, but [can] consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction." Gotha v. United States,

115 F.3d 176, 179 (3d Cir. 1997). See also Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891-892 (3d Cir. 1977). In such a situation, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Carpet Group, 227 F.3d at 69 (quoting Mortensen, 549 F.2d at 891). Although the court should determine subject matter jurisdiction at the outset of a case, "the truth of jurisdictional allegations need not always be determined with finality at the threshold of litigation." Moore at § 12.30[1]. Rather, a party may first establish jurisdiction "by means of a nonfrivolous assertion of jurisdictional elements and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection)." Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 537-38 (1995) (citations omitted).

6. Whether defendant is an employer within the meaning of the ADA is a factual issue, the truth of which need not be determined at the threshold stage of litigation. In the present case, the court is satisfied that plaintiffs have sufficiently alleged the requisite jurisdictional elements at this stage in

the litigation. If, however, through the course of discovery plaintiffs are unable to establish that defendant's enterprise satisfies the statutory definition, defendant will be entitled to summary judgment.

Sue L. Robinson
United States District Judge